No. 2944

IN THE

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

In re:
MOK NUEY TAU, on Habeas Corpus,
Appellant,

vs.

EDWARD WHITE, as Commissioner, etc.,
Appellee.

# Appellant's Petition for a Rehearing



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*To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit*:

This appellant humbly presents this his petition for a rehearing based upon the fact that since the hearing herein the statute under which this proceed-

ing was had, has been changed by Congress in such a way as to indicate, we respectfully submit, that the statutory construction we had formerly urged in this matter was well taken as correctly interpreting the former intention of Congress. This assertion seems well founded in the light of certain changes in the new General Immigration Law hereinafter set forth.

The first point urged by the appellant was that being a Chinese person if illegally here, he is entitled to have that fact determined by the judicial branch of the government. If the ILLEGALITY in question arises from the Chinese Exclusion or Expulsion Laws, such a hearing is mandatory according to the terms of the said laws; but the General Immigration Act in Section 21, providing the machinery of deportation by Executive Warrant and hearing, for those liable to deportation thereunder also contains the phrase "OF ANY OTHER LAW OF THE UNITED STATES"; while section 43 of the last mentioned act provides that it "SHALL NOT BE CONSTRUED TO REPEAL, ALTER, OR AMEND EXISTING LAWS RELATING TO THE IMMIGRATION OR EXCLUSION OF CHINESE PERSONS OR PERSONS OF CHINESE DESCENT." Obviously if the appellant is here in violation of the General Immigration Law, he may be deported by the machinery therein provided, notwithstanding the fact that the particular infraction of the General Immigration Law was also a violation of the earlier Chinese Ex-

clusion or Expulsion Laws. The reason is that any alien other than Chinese might also be deported for the same infraction of the General Immigration Law. ANY ALIEN may surreptitiously enter the United States without inspection, and ANY SUCH ALIEN, including Chinese, may be summarily arrested by executive warrant and so deported. This was the holding of the Supreme Court in U. S. vs. Wong You, 223 U. S. 67. ANY ALIEN may become morally objectionable and hence ANY SUCH ALIEN, including Chinese, may also be summarily arrested by executive warrant and so deported. This was the holding of the Supreme Court in Low Wah Suey vs. Backus, 225 U. S. 460. ANY ALIEN may be physically unfit or deficient, and hence ANY SUCH ALIEN, including Chinese, may also be summarily held without our borders, or if here, arrested by executive warrant and so deported. In re Lee Sher Wing, 164 Fed. 506, 24 Op. Atty. Gen. p. 706. In each of these instances the subject of the proceedings might be a Chinese alien, or a non-Chinese alien. Eliminate the Chinese Exclusion or Expulsion Act entirely, and the indicated Chinese person who entered surreptitiously, who was morally objectionable or physically unfit, might still be so proceeded against. That, we submit, is the true test as to whether any particular interpretation of the General Immigration Law would in effect be an amendment, a repeal or an alteration of the existing Chinese Exclusion or Expulsion Act. If the Chinese Exclu-

sion or Expulsion Acts are necessary to support a cause of action, then it is an alteration or amendment thereof, and to that extent a repeal of its provisions, to proceed in a manner contrary to that authorized by the Chinese Exclusion or Expulsion Acts.

In the case at bar, if the Chinese Exclusion or Expulsion Acts were eliminated, there would be no cause of action under the General Immigration Law. The government claims a violation solely of the Chinese Exclusion or Expulsion Laws, and claims that the subject thereof is deportable therefore in the manner provided for in the General Immigration Law because of the said phrase "OR OF ANY OTHER LAW OF THE UNITED STATES." The appellant claims that to do this is to violate the said section 43, which says that the General Immigration Law "SHALL NOT BE CONSTRUED TO REPEAL, ALTER OR AMEND EXISTING LAWS RELATING TO THE IMMIGRATION OR EXCLUSION OF CHINESE PERSONS OR PERSONS OF CHINESE DESCENT."

In its opinion herein the court decides the point adversely to the appellant on the authority of U. S. vs. Wong You, 223 U. S. 67, and Backus vs. Ow Sam Goon, 235 Fed. 847. As to the first case we have shown that Wong You was deportable for a direct violation of the General Immigration Law, not for what was solely a violation of the Chinese Exclusion or Expulsion Laws. In the Ow Sam

Goon case the charge was that the Chinese person had surreptitiously re-entered the United States, that is,—entered without inspection, thus violating section 34 of the General Immigration Act and Sec. 13 of the Act of Sept. 13, 1888, of the Chinese Exclusion and Expulsion Acts. Here we have the same point which was before the Supreme Court in the Wong You case. In its opinion this court held (235 Fed. 849-850):

> "MORROW, Circuit Judge (after stating the facts as above) (1, 2):
>
> 1. It is clear that whatever authority is possessed by the Secretary of Labor to deport aliens found in this country is derived from the Immigration Act of February 20, 1907, c/1134 (34 Stat. 898908), and not from the Chinese Exclusion Act of September 13, 1888, c.1015 (25 Stat. 476), which vests such authority only in United States courts and justices, judges and commissioners thereof.
>
> 2. It is contended by appellant that, from the opinion above mentioned, it is apparent that the lower court considered only the legality of the assistant secretary's finding in the warrant of deportation that the alien was in the United States in violation of section 7 of the Chinese Exclusion Act, and either overlooked or ignored the finding that the alien was in the United States in violation of section 36 of the Immigration Act.

> There is nothing in the opinion suggesting that the court either overlooked or ignored the finding that the alien was in the United States in violation of section 36 of the Immigration Act; on the contrary, the decision is based upon the question of jurisdiction of the assistant secretary under that act."

Apply the test before suggested by eliminating the Chinese Exclusion and Expulsion Acts, and Ow Sam Goon would have been deportable under the General Immigration Law for his surreptitious entry or entry without inspection, had the facts established such a re-entry, which in his case they happily did not. Hence these two cases do not go to the extent of the point presented by this case. The intention of Congress must prevail in construing this statute, its terms are to some extent conflicting.

Happily we are now not without light as to the intention of Congress in the use of that phrase of the General Immigration Laws. The act under consideration was in force Feb. 20, 1907, to July 1st, 1916. Section 19 has been amended in the new act in a manner entirely unnecessary if the opinion of this court correctly expressed the former will of Congress. Note the final clause to the Sec. 19 of the new act:

> "PROVIDED FURTHER: That any person who shall be arrested under the provisions

> of this section, on the ground that he has entered or been found in the United States in violation of any other law thereof which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other law. In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final."

Section 43 of the old act is embraced in Sec. 38 of the new act. Note the alteration:

> "PROVIDED, that this act shall not be construed to repeal, alter, or amend existing laws, relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in section nineteen thereof."

We cannot impute to Congress the enactment of useless legislation, but on the contrary, feel that the act as amended is to be construed as a new departure now, for the first time, authorizing and legalizing an Executive deportation proceeding, under the General Immigration Laws for solely a violation of the Chinese Exclusion or Expulsion Acts. This was the interpretation placed on the act by the Circuit Court of Appeals for the 5th and 7th Circuits, as pointed out in our brief herein.

Upon appellant's behalf it is felt that a judicial hearing or even another executive hearing, now that he will have had prior and adequate notice thereof, will afford appellant an opportunity to present evidence upon his behalf and be represented by counsel at such hearing, and then fully and adequately protect his right of residence in the United States by presenting evidence upon his own behalf and having the benefit of counsel.

Respectfully submitted,

GEO. A. McGOWN,
Attorney for Appellant.

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a rehearing is in judgment of counsel well founded, and is not interposed for delay.

GEO. A. McGOWAN,
Attorney for Appellant.